

February 1, 1994
REPORT TO THE COMMITTEE ON RULES, LEGISLATION,
AND INTERGOVERNMENTAL RELATIONS

DISADVANTAGED SMALL BUSINESS PROGRAM PROPOSAL

As a result of the decision in Associated General Contractors of America, San Diego Chapter, Inc. v. City of San Diego, United States District Court, Southern District of California, Case No. 3-1152K, the Mayor and City Council gave direction to the City Manager and the City Attorney to develop an interim program to replace the City's MBE/WBE Program. This interim program will be in effect until a disparity study is completed and any necessary Charter or ordinance amendments are enacted.

Recently, we were asked to comment on a proposal by Councilmember Roberts to create a disadvantaged small business program. In addition, we have been assisting the City Manager's office and the Equal Opportunity Compliance Program in developing a race and gender neutral program that will permit the City to continue its contracting outreach programs and to track utilization of MBE/WBE's in City contracting.

Neither of the above proposed programs is in final form as of yet and therefore, not ripe for close legal analysis. However, we believe it beneficial for the purposes of your discussions to outline in general terms the legal limitations that will necessarily affect the establishment of an interim program.

Over the years, we have advised the Mayor and Council, the Manager and other members of the City government of the legal hurdles to a variety of proposed modifications to the City's traditional contracting practices. Those practices are set forth in various provisions of the Charter and the Municipal Code. Attached to this report is a list of our opinions and memoranda of law issued during the last fifteen years in response to various proposals to change the matter in which City contracts for public works, supplies, materials, equipment, insurance or consultants are let. Copies of these documents are available upon request.

In summary, those opinions and memoranda of law describe

the obstacles that the current law places upon the City's ability to accomplish social and economic outreach through changes in the City's contracting and purchasing policies. This is primarily due to the restrictions imposed upon the City by the Charter of the City of San Diego and by various provisions of the California and United States constitutions.

The concept of utilizing the City's purchasing power to effectuate social change was not debated at the time of the 1931 Charter. It is therefore, not surprising that the language adopted in 1931 places certain limitations on the City's contracting and purchasing powers. While a Charter change may allow the award of a contract to other than a low bidder, the constitutional issues will remain.

The law in this area is very active at the present time. For example, the California Supreme Court has recently agreed to hear the case of Domar Electric, Inc. v. City of Los Angeles, 19 Cal. App. 4th 1034 (1993). That case held that because the Los Angeles Charter required a contract to be let to the lowest responsible bidder and the MBE/WBE outreach program was not a part of the Charter and purported to establish a non-Charter exception to the competitive bidding requirements the program conflicted with and exceeded the Charter. We will, of course, be monitoring the progress of that litigation.

In the meantime, we summarize the law as follows. Any program that involves the expenditure of City funds for public works contracts or for the purchase of supplies, materials, equipment or insurance, needs to comport with Charter sections 35 (seeking competitive prices), 94 (lowest responsible bid requirements for public works contracts) and 100 (no favoritism in public contracts). In addition, all City contracting procedures, including the procedures for the selection of consultants, must be race and gender neutral.

We stand ready to review any proposal the Mayor and Council desires to adopt to ensure that it is consistent with the provisions of the Charter and free from constitutional challenge.

Respectfully submitted,
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Attachment
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